perpetrators. Some of the judges erroneously attempted to prove these elements in relation to an *accused* that has been charged with command responsibility. Thus, in the *Soares* judgement, the panel incorrectly held that it was necessary to prove that Soares had knowledge of and sympathized with the policy to commit crimes. This is not a requirement under the theory of command responsibility, which proposes that a superior's liability rests on his/her failure to *prevent or punish.*

292. The Panel of Judges however, correctly defined the element of "plan" or "policy" and held that the facts demonstrated that the crimes were committed by the pro-integration group as part of a planned strategy to cause the pro-integrationists to win the referendum, at least at the level of the regional Government.

293. The Commission is also concerned by the panel's sparse reasoning to substantiate its decision to set aside the minimum sentence of imprisonment for 10 years prescribed by Act 26/2000 for each of the crimes charged in this case, and to substitute a term of imprisonment of three years. The Commission also finds that reference to the fact that the crimes were committed during a peak period of violence cannot properly be considered in mitigation of sentence according to international standards; indeed, it is during such periods of violence that the importance of superiors exercising proper control over their subordinates is particularly marked.

294. The Panel however, made a number of significant legal findings consistent with international practice and standards:

(a) That any fraud committed by UNAMET did not justify the ensuing commission of crimes or violence ;

(b) That relying on the jurisprudence of international tribunals and doctrinal sources, the principle of non-retroactivity does not apply to serious violations of human rights or humanitarian law ;[73]

(c) That the Ad Hoc Court is permitted to incorporate international jurisprudence, practices, principles and standards as it is dealing with crimes attracting universal jurisdiction.[74] Moreover, the rules of evidence and procedure applied by the international tribunals are those that are consistent with international standards;

(d) That credible consideration was given by the Panel to the standard of superior responsibility of civilian leaders in the applicable national legislation, drawing on relevant sources of international law, including the jurisprudence of the Nuremberg and Tokyo International Military Tribunals and the ad hoc international criminal tribunals, as well as doctrinal sources.

295. Soares was acquitted on appeal. The *Soares* judgement illustrates that crimes against humanity and legal theories such as superior responsibility are complex components of international criminal law requiring a sound knowledge of not only jurisprudence but also effective interpretation and application of the law to the facts. It may well be the case that

[73] On 3 March 2005, the Constitutional Court's (MK) Panel of Judges rejected Soares' application for judicial review of the same issue.

[74] Another relevant consideration would be the absence of relevant provisions in the domestic legislation.

the Panel was hampered by the limited scope of the indictment and the scarcity of the evidence, but it was also imperative that a conviction be founded on sufficient evidence.

(c) The *Damiri* judgement

296. In the *Damiri* case, the defendant was charged with murder and persecution on the basis of command responsibility. In deciding to convict him, the Ad Hoc Court considered all relevant evidence and provided a sufficiently reasoned opinion underlying their decision. The panel was also inclined to take judicial notice of facts established in previous cases and made reference, whenever necessary, to jurisprudence from other ad hoc international criminal tribunals to assist in its deliberations.

297. In their legal findings and deposition, the Panel of Judges accepted evidence from three Timorese victim-witnesses that soldiers and police had committed crimes together with the militias. The panel considered the statement of Bishop Belo, which was read out in court. In according weight to the statement, the Panel considered that Bishop Belo had provided eye-witness account of TNI involvement. In relation to all three witnesses, the Panel considered the totality of the witnesses' evidence and provided reasons for accepting or rejecting their evidence.

298. In assessing the reliability of witnesses, the Panel noted that out of the 30 witnesses presented in court, 12 were witnesses from the military community and observed that most of them were the former supervisors, colleagues or subordinates of the defendant. On this basis, the panel found that these witnesses were probably motivated to provide exculpatory evidence or – at least – to corroborate one another.

299. The panel carefully examined the facts and provided reasons for accepting some facts and rejecting others. The panel reasoned that it would be near impossible to prove the existence of a Government policy on 'ethnic cleansing', as Governments would never officially declare such policies. In establishing that there was a State policy to carry out an attack against the civilian population, the panel drew upon jurisprudence of ICTY and ICTR, and adopted the correct approach when it drew the necessary inferences of State policy from factors such as the involvement of top-level officials in the setting up of the plan of attack. The Panel held that the systematic nature and scale of the violence and the use of public and private resources used to implement the attack were indications of the existence of a State policy or plan.

300. The Panel concluded that the TNI in East Timor was the "prime element" in the "system of violence" due to the extent of its operational responsibilities and control in East Timor at the material time. It also rejected the special report of the team of army investigators who had investigated into the crimes in 1999 (and excluded the role of the TNI) because they had only interviewed four persons. The panel found that this report was unreliable, as it did not meet the requirements of a proper investigation, given that the incidents covered a vast area and affected a large number of victims; moreover, the interviews were not documented in official records. The panel found sufficient evidence to prove the involvement of the members of TNI and POLRI in the occurrence of riots or

clashes as charged by the Ad Hoc Public Prosecutor, and rejected the Ad Hoc Prosecutor's own submissions that there was no such involvement.

301. The panel's interpretation of the facts, in particular its willingness to find the existence of a State policy to attack the civilian population, is markedly distinct from the panel's approach in the *Tono Suratman* case.

(d) The *Kuswani, Salova and Martins* judgement (*Liquiça* case)

302. The *Damiri* case is contrasted with the case of *Kuswani, Salova and Martins,* who were, respectively, a local TNI commander, the head of police and a *Bupati* of Liquiça. In this case, the defendants were charged on the basis of command responsibility as military commanders or, in the alternative, as civilian superiors for crimes committed by the militia group BMP during an attack on the Liquiça church. Other modes of liability under Act 26/2000, such as attempting, plotting, assisting or committing were not charged, although the TNI was alleged to have participated in an attack on the Liquiça Church complex.

303. The judges in this case also pursued a more restrictive approach to the admissibility of evidence, declined to accord any weight to pre-trial statements of witnesses who were not available to testify in court, and refused to accept photocopies of documentary evidence. The judges were also careful to exclude the involvement of State actors outside the militia group BMP, although the panel did conclude, to satisfy the *chapeau* requirements of crimes against humanity, that the attack was an implementation of a sustained or systematic "policy". The judges rejected the evidence of victim-witnesses implicating the involvement of the State apparatus, and appeared to have accepted the defence's version of events, according to which the TNI was neither involved in the attacks nor facilitated the commission of crimes by the militias.

304. The Commission finds erroneous the apparent substitution of a material element of persecution – namely the severe deprivation of fundamental rights, contrary to international law – with a material element of the crime of torture under Indonesian law, namely "creating uncomfortable feelings, pain or harm or damage to health". As a result, the panel seemed to be assessing the culpability of the accused for a form of torture with discriminatory intent.

305. The Commission also finds the legal analysis of the panel at times convoluted and confusing. On the definition of the contextual element of "widespread attack", the panel referred to the impact of the attack "nationally and internationally", the "severe damage, material and immaterial loss" caused, the "horrible" character of the attack, leading to "feelings of insecurity" in the individual or society, and "involving many parties". The definition applied diverges somewhat from international standards, as defined in the jurisprudence of internationalized courts and tribunals, and the judgement in this case does not provide any substantiation for the definition adopted.

306. Regarding the definition of the "effective command and control" requirement of the modes of liability of command responsibility and superior responsibility, the Panel of Judges seemed to interpret "effective command and control" as "chain of command", and

thus required evidence of "a permanent regulation stating the official position of someone to someone else vertically, as a superior to an inferior or *vice versa*". The definition applied is inconsistent with international standards as defined in the jurisprudence of the international tribunals, according to which the test of effective control is not dependent upon chain of command, and can be satisfied through a material ability to prevent and punish the commission of offences. On the definition of a "military commander" relevant to the mode of liability of command responsibility, the panel adopted a particularly restrictive definition excluding, for example, police officers commanding armed police units, who may be considered as military commanders in certain cases. The judgement also provides limited consideration of the standard "effectively acting as a military commander" contained in Act 26/2000.

307. Applying its interpretation of command responsibility to the available facts, the panel examined whether the BMP was in the military chain of command or under the defendant's effective control. The panel concluded that TNI was not involved in the attack and that there was no superior-subordinate relationship between the leader of BMP and Kuswani.

308. All three defendants were acquitted, primarily as a consequence of the panel's unwillingness to adopt a less restrictive approach to admissibility of evidence and its interpretation of command responsibility.

(e) The *Tono Suratman* case

309. Brigadier-General Suratman was commander of the TNI forces in East Timor during the 1999 outbreak of violence. He was charged for crimes against humanity for failing to control troops under his command and to prevent TNI and police from participating in attacks in two separate incidents. It was alleged that he did not surrender the perpetrators to the appropriate authorities for investigation. He was acquitted of the charges.

310. It was the prosecution's case that Suratman knew or should have known that his troops committed or were committing crimes because first, he was informed by Kuswani about clashes between pro-independent and pro-integration groups and that based on that report, he had ordered negotiations to be conducted. In relation to the killings at Manuel Carrascalao's house, the prosecution alleged that Carrascalao had sought assistance from Suratman in relation to the pending attack on his home, but that Suratman told him that TNI was neutral and refused to provide him with firearms to protect the refugees seeking shelter at his home.

311. The Panel considered evidence from 26 witnesses, of whom 3 were victim-witnesses, 18 TNI, militias or government officials, and six were indictees. They essentially denied the involvement of TNI; testified that Suratman gave instructions to protect the refugees after the attacks; that TNI took preventive measures and assisted the victims and that the incidents were due to a dispute between the two groups. The panel also considered the evidence of Carrascalao and two witnesses who testified that the TNI had participated in the attack on Carrascalao's house. The statements of three other Timorese witnesses were read in court but not substantially discussed.

312. The panel's legal analysis of the elements of crimes against humanity was essentially correct and well researched. However, its application to the facts was less than comprehensible. The panel traced the contextual background of the events in 1999 and concluded that the offer of a referendum led to groups campaigning their causes through violence and terror and that the events in 1999 were caused by these political differences. The panel also characterized the post-referendum situation as an internal armed conflict between the pro-independent and pro-integration groups and concluded that the element of "widespread" or "systematic" attack had been satisfied. The Commission takes the view that it was essential that the panel find that the attack was carried by the pro-integrationists *against* the population. In establishing the contextual elements of crimes against humanity, the Commission does not see the relevance of finding that the other side was also carrying out an attack, unless such evidence was relevant to support a particular defence.

313. In relation to the policy aspect, the panel found that the violence was the result of the Government's "policy to offer the options", i.e. the referendum options of Timorese autonomy or independence from Indonesia. The panel's attempt to establish a link between the violence and a plan or policy is inconsistent with the definition of this contextual element of crime. Article 7, paragraph 2 (a) of the Rome Statute defines an "attack directed against any civilian population" as a "course of conduct" comprising multiple prohibited acts (such as murder, torture etc.) "pursuant to or in furtherance of a State or organizational policy *to commit such attack*" (emphasis added). The Elements of Crimes document specifies that:

> A *policy which has a civilian population as the object of the attack* would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.

314. In contrast with the statutory legal position of the International Criminal Court, the prevailing jurisprudence of the Ad Hoc Tribunals holds that there is no requirement under customary international law of a "plan" or "policy" to support either the attack as a whole or the specific acts of the accused.[75] Early jurisprudence of ICTY and ICTR had interpreted the "systematic" contextual element of crime as requiring a plan or policy to commit the acts in question.[76]

315. However, the panel in the *Suratman* case did not follow any variation of such reasoning, and instead appears to have required that a crime against humanity take place in furtherance of *any* State policy, rather than a policy to commit an attack directed against a civilian population. The Commission's review of several trial judgements does not disclose direct evidence of such a plan or policy on the part of any State, but it would appear that different panels were willing to draw the necessary inferences, depending on the adequacy of evidence presented by the prosecution.

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75 *Kunarać* Appeals Judgement, para. 98. This position has since been followed by the ICTY and ICTR: see e.g. *Tuta* and *Štela* Trial Judgement, para. 234 and *Semanza* Trial Judgement, para. 329.

76 See for example *Tadić* Trial Judgement, paras. 653-655; *Kayishema* Trial Judgement, para. 124.

316. The *Suratman* panel also misconceived the contextual "knowledge" requirement for crimes against humanity. It concluded that Suratman had the requisite knowledge because his subordinates had provided him reports on the violence. This confuses the knowledge requirement of a superior with that of the perpetrator. It is not required that the superior be aware of every single element of the crime in question. Showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates, would be sufficient to prove that he "had reason to know".[77] The reports were more relevant to establish that Suratman was placed on notice that crimes might have been committed by his subordinates, if that was indeed the case.

317. The panel's discussion of superior responsibility is also accurate, relying on the jurisprudence of the international military tribunals established after World War Two and ad hoc international criminal tribunals.

318. The issue at the heart of the case was whether troops under Suratman's command and control were involved in the attacks. In its assessment of the evidence, the panel relied substantively on evidence which favoured Suratman, such as Wiranto's, Gutteres' and other TNI witnesses' testimonies that the military was only initiated days after the referendum and that prior to that, security was the responsibility of the police force. The panel concluded that the attack on Pastor dos Santos was due to his refusal to surrender the leader of the pro-independent group and that there was insufficient evidence that TNI was involved in the attack. It held that TNI assisted the refugees and it helped to separate the two groups. Not surprisingly, the panel concluded that the testimonies of more than 20 other witnesses negated the two victims' evidence.

319. There was also very little analysis of the rally leading to the attack on Carrascalao's house. The panel concluded that the attack occurred spontaneously, as Guterres' cohorts attempted to assist an injured woman outside the house. Gutteres' role was not discussed and the interpretation of the facts is incongruous with the extent of Guterres' participation in the crimes, as discussed below. The panel also inconsistently characterized the violence as "spontaneous clashes" while attempting at the same time to establish a widespread and systematic attack pursuant to a State policy.

320. The case of Tono Suratman was considerably weakened due to the selection of witnesses. The panel also did not examine possible motivations of TNI associated witnesses and other indictees who testified, appearing to accept their evidence since they corroborated each other.

(f) The *Gutteres* judgement

321. In the *Guterres* judgement, the panel engaged in substantive and comprehensive discussion of the law, facts and evidence in support of its findings. The Commission finds that the judgement offers a reasoned opinion documenting all evidence considered and substantiating the legal and factual basis for the conviction. The judges in the *Gutteres* case were also more actively engaged in the judicial process, ordering the prosecution to

[77] *Delalic* Appeals Judgement, para 238 ; *Krnojelac* Appeals Chamber, para 155.

produce Timorese victims as witnesses and, when the prosecution was not able to secure their attendance, permitted their statements to be read in court, which was accorded the weight of testimony given under oath pursuant to article 162 of the Code of Criminal Procedure.

322. The panel listed and analysed the documentary evidence presented by the prosecution and made a series of substantiated factual findings in support of its conclusions that the defendant was actively inciting individuals at pro-integrationists rallies to "exterminate" and "kill" the pro-independence supporters. The judges also found there was a close link between the defendant and the POLRI and TNI because the security forces had often asked the defendant for information and for help to settle conflicts and disputes. In relation to acts of extermination and the scorched earth campaign that followed the announcement of the result of the popular consultation, the panel found that the police and the TNI were also involved in acts of destruction and extermination.

323. The panel also analysed the relevant provisions of the Code of Criminal Procedure, enumerating the factors underpinning the reliability of a witness statement and provided detailed reasoning as to why some witnesses' evidence were accepted as true and accurate.

324. The judges accepted witnesses' evidence that the crimes charged were committed by militias under the command and control of the defendant; that there was corroborated evidence that the defendant's incitement invoked a violent response from the participants in a rally; and that he had knowledge of the consequences of his acts. The judges concluded from the totality of the evidence that the defendant did not try to prevent or had failed to prevent the crimes committed by his subordinates and his trainees after the rally.

325. The judges also embarked on a substantially accurate legal analysis of the legal elements of crimes against humanity and legal requirements of command responsibility, citing jurisprudence from ICTY and ICTR, World War Two war crimes cases and the legal framework of the International Criminal Court to find that civilian leaders holding de facto positions of authority can be found liable under the theory of command responsibility. The panel analysed the relevant organizational structure of militia groups to find that the defendant possessed de facto and de jure authority within and beyond his power structure.

326. The judges were also willing to find that the crimes charged were committed as part of a widespread and systematic attack, although they did not substantiate the nature of the attack (erroneously holding that the "clash" could be considered as part of an attack aimed "towards" civilians). However, other contextual elements of crimes against humanity were generally adequately proven and substantiated. The judges also rejected defence arguments as to the form of the indictment, concluding that typographical errors in the indictment did not prejudice the defendant in the preparation of his defence, consistent with established jurisprudence of the ad hoc international criminal tribunals.

(g) The *Soedjarwo* judgement

327. Lt. Col. Soedjarwo was the TNI Commander (Dandim) in Dili and he was charged for attacks on the Dili diocese and Bishop Belo's residence based on his failure to prevent

the attacks and to control his troops. He was convicted and sentenced to five years' imprisonment.

328. In Soedjarwo's case, the prosecution called 15 witnesses, of which 14 were members of the TNI, Government officials or militia members. The prosecution was unable, under the circumstances, to adduce evidence that the TNI or other State security forces were involved in the commission of the crimes. The pre-trials statements of six witnesses were read in court as they were not available to testify.

329. The Panel found that the defendant, as District Military Commander in Dili, had the requisite authority and jurisdiction to make him responsible for the acts of subordinates under his direct command or control; and that the defendant had the obligation to lead, control, and monitor his personnel.

330. The judgement is commendable in its legal analysis of contextual elements, such as the widespread and systematic attack against civilian population relying on the jurisprudence from ad hoc international criminal tribunals and doctrinal sources. The judgement is also substantially accurate in its legal analysis of command responsibility, drawing upon established jurisprudence. However, some aspects of command responsibility find no support in established jurisprudence. The panel found that "the people who were committing or just committed a gross violation against human rights," are not restricted to those who have committed crimes but also those who did not take necessary action to prevent a gross violation of human rights, implying that the defendant can be held liable for the omission of his subordinates.

331. Thus, in relation to the attack on Bishop Belo's house, the judges carefully sifted through the available facts to conclude that the defendant, as District Military Commander, was responsible for security and order in Dili and should not have agreed to withdraw TNI troops from the protection of Bishop Belo's residence without considering the worsening condition and volatile atmosphere in Dili at that time. The panel found that he was expected to take the most effective action in the circumstances. The judges convicted Soedjarwo not because he failed to *control* the perpetrators, but because he failed to anticipate the attack. The Commission takes the view that this may not be an accurate application of the law on command responsibility.

332. The panel essentially rejected the prosecution's theory as set out in the indictment, as there was little evidence of TNI participation. The panel made no findings that the TNI were in complicity with the perpetrators in orchestrating or assisting in the attacks. Although the Commission cannot agree with the doubtful reasoning which led to the rejection of the victim witnesses' statements documenting active TNI involvement, it cannot be concluded that these findings were unreasonable in light of the overwhelming evidence adduced by the prosecution, which cast doubts on its own case. Unlike the panel in the Damiri case, this panel did not find it necessary to examine whether TNI affiliated witnesses were motivated to deny State involvement.

F. Conclusion

333. Six out of the 18 defendants tried by the Ad Hoc Court were found guilty of crimes against humanity. All but Eurico Gutterres were sentenced to terms of imprisonment below the statutory minimum term. The Supreme Court has upheld the acquittals of most of the defendants; one accused remains convicted and free pending the resolution of his appeal. The verdicts and results do not reflect a pattern of trials reaching pre-ordained outcomes, but the atmosphere and context of the entire proceedings are indicative of lack of political will in Indonesia to seriously and credibly prosecute the defendants.

334. One of the judges who has served on the bench of the Ad Hoc Court complained that Kopassus soldiers were permitted to attend the hearings in large numbers, some of them armed. The judge in question noted that when he was about to deliver the verdict, Kopassus soldiers would shout words of warning and intimidation. The judge was concerned that the organization of the courtroom and applicable domestic legislation did little to ensure the security of the judges. He expressed little faith in the ability of the Ad Hoc Court to render decisions that would ensure the confidence of the public or the international community in the Indonesian judicial system. Another ad hoc judge was of the view that the work of the Ad Hoc Court has not made any significant contribution to strengthening the rule of law in Indonesia, to the restoration of peaceful and normal relations between the two peoples except possibly, at the "governmental level", and that it is incapable of dealing with complex human rights cases involving the "big fish."

335. As discussed above, the Commission has concluded that the Ad Hoc Prosecutors leading these trials were neither adequately prepared nor knowledgeable enough to prosecute complex crimes against humanity cases. The Commission does not have sufficient evidence to address the motivations of the Prosecutors of the Attorney-General's Office, but is compelled to conclude that the Indonesia ad hoc judicial process for East Timor has failed largely due to the incapacity of the prosecution to seriously and adequately prove its case against the defendants. This failure, viewed in conjunction with the lack of political will, plays a significant role in the Commission's final recommendations.

336. The Commission concludes that diverging approaches and judicial technique of the panels in relation to selection of and reliance on evidence, willingness to apply international standards, practice and jurisprudence to supplement and clarify national laws, and proficiency in analytical evaluation of facts and law contributed to the different and inconsistent verdicts and decisions of the Ad Hoc panels. In some cases, the judges were unduly restricted by the pleadings in the indictment and in particular, the lack of judicial mobility to apply appropriate modes of liability to convict the accused has also led to erroneous conclusions and verdicts.

337. The more complex issues that should have been raised and/or discussed such as the historical and contextual background of events in 1999, the involvement of State policy or actors, the military and civilian structures of power and the birth and role of the militias

were issues requiring expert assessment and opinion and extensive analysis of all relevant evidence. Such analysis was absent in most of the judgements.

338. The Commission finds that those panels that were inclined to convict the accused have rendered judgements that are considerably more reasoned and jurisprudentially articulate. Other judgements are rudimentary in legal analysis and in their rejection of the prosecution case. The consequences of the differing and inconsistent verdicts and factual conclusions are, however, far-reaching and damaging to the central objectives of the judicial process before the Ad Hoc Court, which were to establish an accurate historical record of the events in 1999, to hold those most responsible accountable for their crimes, and to strengthen the rule of law in Indonesia.

339. The Commission has serious doubts that any of these objectives have been achieved. This failure is relevant to the Commission's final recommendations to the Secretary-General.

IV. The Commission of Truth and Friendship

A. Mandate

329. On 14 December 2004, the Governments of Indonesia and Timor-Leste concluded a bilateral agreement on the establishment of a Commission of Truth and Friendship (CTF). The two Governments have recently promulgated the terms of reference of the Commission, explaining that its purpose is to "… seek truth and promote friendship as a new and unique approach rather than the prosecutorial process." The Commission will comprise five Commissioners from each country, to be appointed by joint declaration by the Presidents of Indonesia and Timor-Leste.

330. The Commission of Experts is mandated to consider ways in which "…its analysis could be of assistance…" to the Commission of Truth and Friendship, and make recommendations to the Secretary-General in this regard. The Governments of Timor-Leste and Indonesia have also requested that the Commission provide advice and guidance to assist the work of the Commission of Truth and Friendship.

331. The Commission has carefully examined the terms of reference of the Commission of Truth and Friendship in the context of its review, including its consideration of the existing legislative framework of Timor-Leste and Indonesia. The Commission will highlight several areas of the terms of reference that could be reconsidered or improved.

332. The Commission must reiterate that the judicial processes and recommendations considered elsewhere in the present report are distinct from the Commission of Truth and Friendship, which is essentially a bilateral agreement between the two Governments concerned.

B. Analysis of the Commission of Truth and Friendship Terms of Reference

1. Absence of distinction between categories of perpetrators

333. The terms of reference do not distinguish between categories of alleged perpetrators or deponents who may appear before the Commission of Truth and Friendship (CTF). In particular, those who "bear the greatest responsibility" for serious human rights violations are not distinguished from (a) alleged low-level offenders implicated in serious human rights violations; or (b) alleged perpetrators of less serious violations. This is in marked contrast with the mandate of the Commission on Reception, Truth and Reconciliation (CAVR) in Timor-Leste.

334. The Commission is concerned that the terms of reference of the CTF may extend its mandate to include individuals who bear the greatest responsibility for the commission of serious crimes in East Timor in 1999 and who should, in accordance with international standards, face justice before a court of law.

2. Absence of specific mechanisms to address serious human rights violations per se

335. The CTF is mandated to examine and establish the truth concerning "reported human rights violations" in the period "leading up to and immediately following the popular consultation in Timor-Leste in August 1999". This mandate appears to include violations at all levels of gravity. The Commission is concerned that the terms of reference do not explicitly provide for specific mechanisms to address *serious* human rights violations or allegations of *serious crimes* outside the CTF process.

336. This approach is distinct from the mandate of the Commission on Reception, Truth and Reconciliation in Timor-Leste, which requires that it refer evidence of serious crimes to the SCU for a decision on prosecution.

3. Power to recommend amnesty for serious crimes

337. The CTF is granted the power to recommend amnesty for serious violations of human rights. However, given the constitutional framework of Timor-Leste, which provides for the prosecution of serious crimes before the Special Panels or an international court (if established), and gives binding effect to customary international law in the national legal system, the two Governments may wish to consider whether it is tenable to empower a bilateral body to grant amnesty for serious violations of human rights amounting to international crimes.

338. Referring to relevant international standards crystallized over time, the *reconciliation practice* of the CTF should bar access to amnesty procedures for cases of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto, and other violations of international humanitarian law and international human rights that are crimes under international law, and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution and slavery.[78]

339. The two Governments may wish to consider whether in other cases of serious violations of human rights, a recommendation to grant amnesty could be premised on certain conditions additional to truth-telling, such as suitable reparations to victims,[79] full cooperation with the ongoing judicial processes, or conditions derived from the practice of the CAVR, such as orders for community service, public apology or other acts of contrition.

340. In this regard, the Commission observes that the power to recommend amnesty is presented in the CTF terms of reference as only one of a series of possible measures with the stated aim of healing the wounds of the past, rehabilitating and restoring human dignity.

[78] See the Set of Principles to Combat Impunity. (E/CN.4/2005/102/Add.1, Principle 24). See also *Prosecutor* v. *Furundzija*, (ICTY), Trial Chamber Judgment, 10 December 1998, para. 155; Special Court for Sierra Leone, *Prosecutor* v. *Kallon*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber, 13 March 2004. See also the Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616).

[79] In particular, although Act No 26/2000 provides that all victims "shall receive compensation, restitution and rehabilitation" (art. 35), a NGO report dated September 2003 observed that no such applications had been presented in cases heard by the Ad Hoc Court in Jakarta.

341. The two Governments are invited to reconsider structuring the exercise of discretion to recommend amnesty in light of applicable international standards, including potential bars or pre-requisites to recommending amnesty, and factors to consider in exercising this discretion.

4. Apparent exclusion of further justice or accountability mechanisms

342. The objective of the CTF is to bring "definitive closure" and establish the "conclusive truth", to the apparent exclusion of further justice processes. Paragraph 10 of the terms of reference suggests a preference for truth-seeking and the promotion of friendship through the CTF rather than through the judicial process. This is somewhat inconsistent with the declaration in paragraph 8(a) of the terms of reference that the judicial process before the Ad Hoc Court has not been completed. Clarification is required as to the precise extent to which serious human rights violations will be resolved through the CTF to the exclusion of existing or future criminal justice processes. The two Governments may wish to reassess the exclusion of further justice processes in the terms of reference.

343. In this regard, it is noteworthy that the CTF is directed to work under the principles contained in the relevant national legislation on reconciliation. The applicable Timorese legislation establishing the CAVR clearly implements international standards by barring access not only to blanket amnesty, but to all forms of community reconciliation processes for those implicated in all *serious crimes* – defined as genocide, crimes against humanity, war crimes, murder, sexual assault and torture – and maintains the prosecution of such cases under the exclusive jurisdiction of the General Prosecutor.

344. Indonesia's legislation on human rights courts addresses the relationship between such courts and reconciliation processes, and provides that cases of gross violations of human rights (limited to genocide and crimes against humanity) cannot be addressed simultaneously through reconciliation processes and *vice versa*. Indonesia's legislation on substantive human rights standards, Act 39/1999, further provides, in article 17, that "Everyone, without discrimination, has the right to justice by submitting applications, grievances and charges, of a criminal civil and administrative nature and to a hearing by an independent and impartial tribunal…" Act 26/2000 also mentions a Truth and Reconciliation Commission as referred to in the decree of the People's Legislative Assembly No. V/MPR/2000 concerning of Consolidation of National Unity and Integrity. This Truth and Reconciliation Commission will be established under an act as an *extrajudicial* agency charged with establishing the truth by discussing past misuse of authority and violations of human rights, in accordance with prevailing law and legislation, and with undertaking reconciliation in the common interest of the nation.

345. Thus, despite notable differences in the legal framework, the Commission observes that applicable national legislation in both Indonesia and Timor-Leste recognize the central importance of prosecuting serious violations of human rights through the courts.

5. Treatment of confidential material and witnesses

346. The CTF is entitled to review, inter alia, existing SCU indictments in order to establish "the truth concerning reported human rights violations including patterns of behaviour". Such findings

may compromise future adjudication of cases of serious human rights violations. The two Governments may wish to consider how the CTF could implement provisions protecting the confidentiality and integrity of information and the security, physical and psychological well-being and privacy of victims and witnesses who may appear before the CTF, so as to fully respect the rights of victims and witnesses and not to compromise investigations and prosecutions of serious crimes. In particular, the Commission takes the view that an agreement must be reached regulating information sharing and use of information obtained from the Special Panels, SCU the Ad Hoc Court and CAVR.[80]

6. Independence of the CTF

347. The Commission notes that the Foreign Ministers of Indonesia and Timor-Leste have been appointed to act in an "advisory" role to the CTF, although the Commissioners are mandated to work independently. In the interests of transparency, the two Governments may wish to clarify in detail their respective roles in this process.

7. Governmental support not necessarily indicative of public support

348. The Commission of Truth and Friendship has received the sanction of the Governments of Indonesia and Timor-Leste, and has been praised at the sixty-first session of the Commission on Human Rights by the Foreign Ministers of both States. However, the Commission of Experts has ascertained that the Government's firm support for the Commission of Truth and Friendship does not necessarily reflect broad public support in Timor-Leste, according to oral and written statements provided to the Commission by civil society, including international justice NGOs, victims' groups and civil and religious leaders in Timor-Leste, as well as other sources.

349. A member of an Indonesian-based NGO has commented that "There are no problems at all between Indonesians and East Timorese, so a reconciliation between peoples of the two countries is not needed. The problem of human rights violations in East Timor does not lie in people-to-people relations, but lies instead with the TNI and its militias as the alleged perpetrators of the violence against the East Timorese."[81]

350. All of the victims and victims' families with whom the Commission met have pointed out that they are dissatisfied that perpetrators of serious violations of human rights in 1999 are still at large in Indonesia and have not been brought to trial in a court of law.

351. The Commission notes that the Commission of Truth and Friendship was established through diplomatic channels without the consultation and moral authority of the people of Timor-Leste. The Commission is advised that the terms of reference were not rigorously debated by the Parliament of Timor-Leste prior to their approval by the two Governments, although the Commission has been informed that apparently most Timorese parliamentarians support the CTF. The Commission has

[80] In this regard, the Commission observes that the terms of reference of the CTF do not *specifically* provide for access to the records of the SCU, but the Commission has interpreted the terms of reference to include such access

[81] "New international initiative needed to create justice for East Timor", The Jakarta Post, 19 May 2005, by Agung Yudhawiranata (international relations researcher at ELSAM).

been advised that the Terms of Reference of the Commission of Truth and Friendship have been viewed as a bilateral agreement and will not be ratified by the Indonesian parliament.

8. Reparations

352. The Commission envisages a role for the Commission of Truth and Friendship in ensuring that the right of victims to reparation is implemented through measures of compensation, rehabilitation, satisfaction and guarantees of non-repetition, as appropriate, but is concerned that its terms of reference do not establish a framework for the implementation of this right that satisfies international standards. The Commission recommends that both Governments consider the question of reparations, particularly collective compensation, as one of the implementation measures available to the Commissioners of the CTF.

9. International support for the Commission of Truth and Friendship

353. The Governments of Indonesia and Timor-Leste must realise that the United Nations do not condone amnesties regarding war crimes, crimes against humanity and genocide.

354. Any possible involvement of the United Nations in the work of the CTF must be premised on an understanding of the extent of the CTF's mandate. For instance, the Commission notes that during the trials before the Ad Hoc Court, allegations of fraudulent conduct were made by indictees and witnesses against UNAMET. This issue was discussed at length during some of the trial proceedings. The Commission is conc erned that the terms of reference of the CTF do not preclude a further "revisiting" of the role of UNAMET on the basis of access to materials, including witness statements, from the Ad Hoc Court.

355. As discussed above, the Commission has grave reservations regarding certain areas of the terms of reference. Under the circumstances, the Commission cannot advise that the international community provide financial and/or advisory support unless the two Governments reconsider the terms of reference, and the Secretary-General is satisfied that the CTF conform to international standards, in particular to principles 6 to 18 of the updated Set of Principles to Combat Impunity relevant to truth commissions.

V. Findings

356. On the basis of the above analysis, the Commission summarizes its findings as follows.

A. The serious crimes process (Timor-Leste)

357. The Commission finds that the serious crimes process in Timor-Leste – including investigations, indictments, prosecutions, defence and judicial proceedings – is generally satisfactory and accords with international standards.

358. The Commission finds that the serious crimes process has been able to achieve some measure of justice for the victims and their families and has contributed to community reconciliation. It has achieved accountability for some of the atrocities committed in 1999, and has contributed to strengthening the rule of law in Timor-Leste, for example, through constructive interaction between international and domestic prosecutors, judges and lawyers, investigators, and training of domestic law enforcement and judicial officers.

359. However, the Commission finds that the serious crimes process has not achieved accountability of those who bear the *greatest responsibility* for serious violations of human rights in East Timor in 1999.

360. The Commission finds that the inability of the serious crimes process to bring most alleged perpetrators to trial is due to a lack of an extradition agreement between Indonesia and Timor-Leste or any other form of effective mutual legal assistance framework for the arrest and transfer of indictees at large.

361. SCU did not implement a clear prosecution strategy or focus at the outset of its operations, and has faced a stringent lack of resources in its work. The Commission finds a pressing need for properly resourced investigations to continue in Timor-Leste, and for evidence to be preserved.

362. The Commission finds that the Special Panels have experienced a critical lack of capacity, inadequate administrative support and infrastructure and organizational planning during the first two and a half years of their operations. There is a need for additional resources to be allocated in areas such as security and legal research, to enable the administrative staff and judges to function more effectively and efficiently.

363. The Commission finds that the Office of the General Prosecutor of Timor-Leste does not, at present, function independently from the Government of Timor-Leste and appears to be subject to undue political pressure and influence.

364. The Commission finds an absence of political will and Government support in Timor-Leste for the continuation of the serious crimes process, which seriously impedes the process of bringing to justice those responsible for crimes against humanity in East Timor in 1999 through the available judicial mechanisms in Timor-Leste.

365. The Commission finds that the domestic investigative and prosecution authorities of Timor-Leste are unlikely to have the capacity to undertake the investigation and prosecution of serious crimes in accordance with international standards if the SCU is withdrawn from Timor-Leste.

366. The Commission finds that the Special Panels do not, as yet, have the institutional capacity to hear and adjudicate serious crimes cases without an international component.

367. The Commission finds that that there is an absence of competent Timorese defence counsel with experience in the conduct of serious crimes cases.

B. The Ad Hoc Human Rights Court for Timor-Leste (Indonesia)

368. The Commission finds that the KPP HAM report provides an authentic account of the human rights violations in East Timor and a credible template for further investigations in areas where there has been a lack of cooperation or access to information. The Commission finds that the inquiry procedures of KPP HAM conformed to international standards relating to pro justitia inquiries.

369. The Commission finds laudable and progressive recent legal reforms to ensure independence of the judiciary and achieving respect for human rights in the Republic of Indonesia.

370. However, the Commission finds that the judicial process before the Ad Hoc Court was seriously flawed and inadequate. In particular, the scale and widespread occurrence of violence and the systematicity of the attacks against the civilian population of East Timor were not thoroughly addressed, as the temporal mandate of the Ad Hoc Court was unduly restrictive. The trial proceedings before the Ad Hoc Court did not give due consideration to the relationship between the Government of Indonesia and paramilitary and civilian militias, and the full culpability of those involved in the perpetration of the crimes. Furthermore, the trial proceedings did not adequately consider or refer to the organizational structure, chain of command and control, and plan and policy of the armed forces involved in the events of 1999.

371. The Commission finds that prosecutions before the Ad Hoc Court were manifestly deficient. There was little commitment to an effective prosecution process, which was marred by numerous lacunae in the conduct of investigations, protection of witnesses and victims, presentation of relevant evidence, lack of professionalism and ethics and rigorous pursuit of truth and accountability of those responsible.

372. The Commission finds that there was inadequate infrastructure and logistical arrangements in place to ensure non-disclosure of the identity of victim or witness and to prevent intimidation of witnesses and judges.

373. The Commission finds that the Panels of judges of the Ad Hoc Court applied divergent approaches and judicial techniques in their analysis and reliance upon evidence. Their willingness or otherwise to apply international human rights standards, practice and jurisprudence to supplement

and clarify national laws, and their proficiency in analytical evaluation of facts and law have contributed to the inconsistent factual findings and verdicts of the Ad Hoc Court.

374. The Commission finds that the inconsistent verdicts and factual findings of the Ad Hoc Court have undermined the central objectives of this judicial process, namely to establish an accurate historical record of the events in 1999, to hold those most responsible and accountable for their crimes, and to strengthen the rule of law in Indonesia.

375. The Commission finds that the judicial process before the Ad Hoc Court was manifestly inadequate with respect to investigations, prosecution and trials, and has failed to deliver justice. The atmosphere and context of the entire court proceedings were indicative of the lack of political will in Indonesia to seriously and credibly prosecute the defendants.

C. Commission of Truth and Friendship

376. The Commission finds that there are certain provisions in the terms of reference of the Commission of Truth and Friendship which contradict international standards of denial of impunity for crimes against humanity, which require clarification, re-assessment and revision. However, the spirit of reconciliation in the other provisions of the terms of reference, including the possibility of providing reparation for harm caused, offer appropriate avenues for rebuilding the relationship between Indonesia and Timor-Leste.

VI. Justice for Timor-Leste

377. Before the Commission examines all the available options and sets out it recommendations, it is pertinent to make a few observations on the prevailing views of the people of Timor-Leste, the Governments, the United Nations and the international community interested in the judicial processes of Indonesia and Timor-Leste.

378. The Government of Timor-Leste views the Commission of Truth and Friendship as a mechanism to establish truth. It believes that if Indonesia acknowledges the truth, this process may itself bring a sense of resolution as Indonesia confronts its past. The Government of Timor-Leste is convinced that the Commission of Truth and Friendship is the only way forward as it places great significance on its relationship with Indonesia. It believes in restorative justice and is confident that the Timorese people are forgiving. President Gusmão has stressed that the main objective of the Commission of Truth and Friendship is to ascertain the truth and establish institutional responsibility. The Government of Timor-Leste is now unequivocal that it will not endorse any United Nations initiative that will require the political and logistical support of the Government.

379. The Commission takes the view that a truth-seeking commission could assist in completing the work of the serious crimes process in Timor-Leste by collecting and preserving information and evidence that could be utilized in future prosecutions. A truth-seeking mechanism may not, however, achieve justice in the sense understood by civil society and victims groups, or the justice that the Security Council hopes to achieve in Timor-Leste, as expressed in its resolution 1264 (1999).

380. The Commission takes the view that any credible reconciliation or truth-seeking process, if established in Timor-Leste or Indonesia after CAVR concludes its mandate would have to be designed and implemented in parallel with, or explicitly complementary to any justice initiative the Security Council decides to adopt.

381. In many discussions with victims' groups and NGOs, the Commission has heard consistent calls for those individuals responsible for serious human rights violations in 1999 to be brought before a credible justice process. The Commission was advised that in a recent opinion poll, 52 per cent of the population responded that justice must be sought even if it slows down reconciliation with Indonesia, while 39 per cent favoured reconciliation even if that meant significantly reducing efforts to seek justice.[82]

382. The victims addressing the Commission firmly viewed monetary compensation as less significant than witnessing a credible justice process in a court of law. Victims groups have also expressed full support for the continuation of the work of the serious crimes processes in Timor-Leste, but have raised concerns that only Timorese offenders have been tried and sentenced and that those who bear the greatest responsibility are still at large. It is their desire to see that these individuals are investigated, prosecuted and punished by a credible judicial mechanism.

383. The Commission had the opportunity to meet with the head of the Catholic Church in Timor-Leste, the Bishop of Dili, to discuss relevant matters pertaining to the events in 1999. The Bishop

[82] National Public Opinion Poll, Executive Summary, 2004, conducted by the International Republican Institute.

was forthright in his views about the events of 1999 and stated in no uncertain terms that a justice mechanism should be adopted to bring those responsible to justice and to compensate the victims. The religious leaders in Timor-Leste have expressed hope that the voice of the Timorese people, who have suffered a situation of impunity, would be heard. They will continue to insist on the moral and legal accountability of all individuals who have committed human rights violation and crimes against humanity in East Timor from 1975 to 1999. They have emphasized that the Commission of Truth and Friendship should not be treated as a substitute for criminal justice and that there will be no progress in the implementation of the rule of law and democracy in Timor-Leste if impunity prevails. The Bishop has provided us with a statement, reproduced in annex B.

384. In its most recent resolution 1599 (2005) of 28 April 2005, the Security Council "reaffirms the need for credible accountability for the serious human rights violations committed in east Timor in 1999" and "looks forward to the Commission's upcoming report exploring possible ways to address this issue."

385. In conclusion, the Commission recalls resolution 2005/81, adopted by the Commission on Human Rights at its sixty-first session, which was chaired by Indonesia. In this resolution, the Commission urged Member States:

> "To provide the victims of violations of human rights and international humanitarian law that constitute crimes with a fair, equitable, independent and impartial judicial process through which these violations can be investigated and made public in accordance with international standards of justice, fairness and due process of law."

386. Despite the progressive reforms the Republic of Indonesia has adopted, the Commission cannot overlook the large-scale violations of human rights alleged to have been committed by the Indonesian armed forces. These gross violations of human rights cannot be allowed to go unpunished.

387. The Commission has given due consideration to the many competing interests, demands, and views on justice for the Timor-Leste people. The Commission is however, primarily guided by fundamental aspects of its mandate which is to determine whether full accountability has been achieved and to recommend future actions as may be required to ensure accountability and promote reconciliation in Timor-Leste.

VII. Available justice mechanisms and initiatives

A. Introduction

388. The Commission will now turn to examine all available justice mechanisms to address the twin issues of impunity and accountability. The Commission is guided by the Secretary-General's requirement, as set out in its terms of reference, that the Commission consider and recommend "legally sound and practically feasible measures and/or mechanisms so that those responsible are held accountable, justice is secured for the victims and the people of Timor-Leste and reconciliation is promoted."

389. It must be emphasized that the exercise of national criminal jurisdiction over the most serious crimes of concern to the international community as a whole is an expression of the *primary responsibility* of States to ensure that those responsible for such crimes do not go unpunished.

B. Options relevant to the Ad Hoc Court (Indonesia)

1. Reform of the judicial process

390. The Ad Hoc Court is central to the protection and promotion of human rights and freedoms in Indonesia and ensuring that the victims of the 1999 crimes obtain effective remedies and protection. Although the Commission has been advised of significant legal and judicial reforms to ensure independence of the judiciary, it is essential that Indonesia addresses the serious shortcomings, obstacles and failures inherent in its judicial system and undertakes credible reforms of its justice process.

391. The Commission has given due consideration to the question of whether Indonesia should undertake significant reforms of its judicial system in accordance with international standards, and has made specific recommendations relevant to the Ad Hoc Court.

2. Re-trial of adjudicated cases

392. The Commission will now examine the possibility of the re-adjudication of the trials completed in Jakarta.

393. The Commission notes that a number of indictees in the indictment of *Wiranto et al.* by the SCU in Timor-Leste – namely Abilio Soares, Adam Damiri, Tono Suratman, Noer Muis and Yayat Sudrajat – have all been prosecuted and have either been convicted or acquitted by the Ad Hoc Court in Indonesia. Those who were convicted at trial have been acquitted on appeal. During our mission in Dili, the SCU has expressed its intention to pursue the *Wiranto et al.* indictment against the same individuals, regardless of the outcome of the Indonesian trials.

447. The Commission notes that prevailing legal, institutional and governmental positions, at least those articulated publicly, indicate that the temporal jurisdiction of the ICC begins from the date of entry into force of the Rome Statute (namely 1 July 2002 for States parties to the Rome Statute at the time). Although, the Chambers of the ICC have not yet pronounced on this question, a limited body of specialized doctrinal commentary has considered the possibility that the ICC could exercise jurisdiction over crimes committed prior to the entry into force of the Statute, as the temporal jurisdiction of the ICC may be extended by referral from the Security Council or, in the alternative, may be interpreted as inapplicable to Security Council referrals.

448. The crimes committed in Timor-Leste in 1999 appear to fall outside the explicit temporal jurisdiction of the ICC, established in article 11 of the Statute.[99]

449. The Statute is an "international treaty" within the terms of article 2, paragraph 1, of the Vienna Convention on the Law of Treaties and in accordance with article. 28 of the Vienna Convention, the provisions of the Rome Statute do not bind States parties in relation to "any act or fact which took place or any situation which ceased to exist" before 1 July 2002. However, the principle of non-retroactivity contained in the Vienna Convention does not apply, according to its article 28, where "a different intention appears from the treaty or is otherwise established". Accordingly, an interpretation of the Statute in accordance with articles 31 et seq. of the Vienna Convention is required.

450. Article 11, paragraph 1, of the Statute provides that the jurisdiction *ratione temporis* of the ICC shall be limited to crimes committed "after the entry into force" of the Statute, that is, according to article 126, paragraph 1, from "the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, approval or accession". The Statute entered into force on *1 July 2002*. According to the ordinary meaning of article 11 then, the ICC "has jurisdiction only with respect to crimes committed after" 1 July 2002.

451. The non-retrospective jurisdiction of the ICC appears to be reinforced by the context in which article 11 operates, namely that of establishing *individual criminal responsibility* under the Statute. This is reflected by provisions on *nullum crimen sine lege*[100]) and *non-retroactivity ratione personae.*[101] It is certainly important not to conflate the concept of jurisdictional temporal competence[102] with general principles of criminal law,[103] however, the content of article 11 is

[99] Article 11 states that in relation to the jurisdiction *ratione temporis,* "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. Moreover, "If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3."

[100] "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court".

[101] ("No person shall be criminally responsible under this Statute for conduct prior to the entry into force of this Statute").

[102] See *Prosecutor* v. *Tadić*, Decision on the Defence Motion for an Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber, para. 10 [and relevant jurisprudence of the Special Panels.

[103] See S. Bourgon, "Jurisdiction *ratione temporis*" in A. Cassese et al., eds., Commentary on the Rome Statute of the International Criminal Court (2002), p. 549.

VIII. The right of victims to reparations

492. The Commission is mandated to consider measures and mechanisms to secure justice for victims of serious violations of human rights in East Timor in 1999, and to promote reconciliation. The aims of justice and reconciliation are served not only through the investigation and prosecution of perpetrators but also through the implementation of the rights of victims, in accordance with international standards[119] as well as provisions of national law, where available, in Indonesia[120] and Timor-Leste.[121]

493. The Commission has sought and received the views of a number of victims and representatives of victims' groups in Timor-Leste – including victims of sexual and gender-based violence – relevant to the question of reparations.

494. The Commission is mindful that the legal framework of CAVR does provide for community reconciliation agreements and is advised that such agreements have, in certain cases, included measures of restitution or compensation for the victims of violations, including the families of those killed. However, as reconciliation measures are only available for conduct not amounting to "serious crimes", victims of the gravest violations of human rights would not receive any form of reparation through the CAVR mechanism.

495. The Commission notes that some victims of gross human rights violations have been able to receive assistance from the Urgent Reparations Scheme operated by CAVR, designed as an interim measure to address urgent needs of victims, without prejudice to their right to full reparations. The Commission reiterates that such interim assistance does not limit or substitute for the right of all victims of gross violations of international human rights and serious violations of international humanitarian law to adequate, effective and prompt reparation.

496. The Commission would envisage a potential role for the CTF in ensuring that the right of victims to reparation is implemented through measures of reparation, rehabilitation, satisfaction or guarantees of non-repetition. However, the Commission is also concerned that the CTF terms of reference do not establish a framework for the implementation of this right that satisfies international standards.

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[119] According to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the Commission on Human Rights at its sixty-first session, victims have a right to reparation from the State for acts or omissions amounting to violations which can be attributed to the State. The right to reparation may take several forms: restitution, compensation, rehabilitation, satisfaction and/or guarantees of non-repetition The Commission observes that Indonesia voted in favour of the Basic Principles. The Updated Set of Principles to Combat Impunity, welcomed by the Commission on Human Rights without a vote on 21 April 2005, reiterate the rights of victims to access justice, to reparation and to information and considered by the Commission in the context of the Commission of Truth and Friendship, below.

[120] According to article 35 of Act 26/2000, "every victim of a violation of human rights violations and/or his/her beneficiaries shall receive compensation, restitution and rehabilitation", which "shall be recorded in the ruling of the Human Rights Court". The Commission is concerned that none of the judgements of the Ad Hoc Court recording a conviction at trial for serious human rights violations provide for such measures of reparation.

[121] The right to reparation is not explicitly addressed in the Constitution of Timor-Leste, the Transitional Rules of Criminal Procedure or UNTAET Regulations relevant to the Special Panels. The Commission is not aware of any case before the Special Panels providing for or implementing a right to reparation for victims.

497. The Commission has also considered recommendations advocating other compensatory mechanisms, such as the establishment of an international civil tribunal or compensation commission. In light of the other available mechanisms set out in the recommendations of the Commission, the Commission does not advise the establishment of additional compensatory mechanisms at the present time. The Commission notes that reparations in the form of *individual* compensation could be pursued in addition to the criminal proceedings.

498. The Commission takes the view that, in the particular context of Timor-Leste, without prejudice to the realization of all rights of victims of violations, the implementation of the right of victims to adequate, prompt and effective reparation should prioritize particular measures of *collective* compensation, rehabilitation and satisfaction over the immediate term.

499. As a measure of collective compensation in kind and rehabilitation of particular urgency, the Commission urges the international community to provide the necessary means for the Government of Timor-Leste to strengthen available social services in districts particularly affected by the violations of 1999, through measures such as the strengthening of infrastructure and the establishment of schools and universities, hospitals, hospices, dispensaries or other measures as advisable to the Government. Should legal responsibility for violations in Timor-Leste in 1999 be attributed to a State, the costs for such assistance should be reimbursed by that State.

500. The Commission has also inquired into the issue of repatriation of human remains. The SCU mortuary (the only one in Timor-Leste) has custody of 47 sets of unidentified human remains related to SCU investigations and 50 sets of unidentified human remains related to national investigations agencies. The SCU is presently examining the most appropriate means of returning the human remains to the Timorese community. It should be allowed to complete the identification project with some assistance from organizations such as the International Commission for Missing Persons.

501. Accordingly, as a measure of satisfaction, the Commission takes the view that an appropriate authority should assist victims in the recovery, identification and reburial of the bodies of those killed, including, as soon as practicable, remains currently secured as evidence for completed cases before the Special Panels. Should legal responsibility for violations in Timor-Leste in 1999 be attributed to a State, the costs for such assistance should be reimbursed by that State.

IX. Recommendations

A. Recommendations relevant to Timor-Leste

502. The Commission has accorded much consideration to the efficacy and feasibility of all available options and will now turn to its final recommendations.

1. Continuation of the work of the serious crimes process (Serious Crimes Unit, Special Panels for Serious Crimes and Defence Lawyers Unit)

503. It is regrettable that although there are a substantial number of outstanding cases pending indictment, the serious crimes process is to be liquidated pursuant to Security Council resolutions 1543 (2004) of 14 May 2004 and 1599 (2005) of 28 April 2005. This would inevitably lead to a breakdown in the criminal justice system in Timor-Leste and encourage impunity, as those who have been indicted would escape trial and punishment.[122]

504. The Commission of Experts urges the Security Council to ensure that the SCU, Special Panels and DLU be provisionally retained until such time as the Secretary-General and Security Council have had an opportunity of examining the recommendations made in the report of the Commission.[123]

505. The Commission recommends that the Security Council ensure the continuity of the work of the SCU, Special Panels and DLU until such time as the investigations, indictments and prosecutions of those who are alleged to have committed serious crimes are completed.

506. In the alternative, if the above recommendation is not retained, the Commission strongly recommends that the United Nations set up a mechanism under which investigations and prosecutions of serious violations of human rights can be continued and completed. The Commission recommends the establishment of such a mechanism, allowing the Government of Timor-Leste to retain sovereignty over the justice process, permit institutional and capacity-building and allow the international community to assist in this process through funding, providing human resources and/or facilitating institution-building.

2. Continuation of the work of the Serious Crimes Unit, Special Panels and DLU by way of another justice mechanism

507. It is evident that the work of the serious crimes process in Timor-Leste is incomplete. In order to ensure that impunity does not prevail, the Commission sees a clear need for a continuing mechanism to bring those responsible for serious violations of human rights in 1999 to justice.

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[122] As discussed in chapter II on the serious crimes process in Timor-Leste above, international staff members of SCU and the Special Panels are currently engaged in training local staff, including those of the Ordinary Crimes Unit of the Office of the General Prosecutor.

[123] On 29 April 2005, the Commission sent a letter to the Secretary-General, requesting that the Secretary-General take all necessary measures to suspend or delay the liquidation of the serious crimes process in Timor-Leste.

508. The Commission makes this recommendation primarily on the premise that the legal system and institutions of Timor-Leste do not yet have the capacity to continue the work of the SCU, Special Panels and DLU and that the Government of Timor-Leste will not support or cooperate with any other judicial mechanism affiliated with the United Nations. The emphasis of this recommendation is therefore placed on a significant capacity–building element and does not solely envisage the efficient completion of investigations and prosecutions.

509. It is essential that the Commission sets out the relevant draft organic laws currently tabled before Parliament. The success of the proposed justice mechanism depends on the approval by Parliament of these draft laws. In relation to the proposed prosecuting authority, the Parliament is currently debating a draft organic law for the Office of the Prosecutor.

510. This draft law regulates the structure and constitution of the prosecution office, including the Superior Council of Prosecutors. There is no explicit provision requiring the establishment of a specialized unit to deal with crimes such as crimes against humanity. The present draft of the law only provides that the prosecution service should be impartial (art. 2, para.2) and have the competence to "exercise the criminal action" and "represent and defend the interests of the State" (art. 3, paras. 1 (d) and 1 (a), respectively). The draft law requires a prosecutor to possess Timorese nationality (art. 54(a)) but also provides, in its chapter on transitional measures, for the possibility of making use of international prosecutors with a minimum of five years' experience and from a civil law system or with considerable experience in comparative law, when required (art. 85). The Commission notes that the draft Penal Code of Timor-Leste includes international crimes such as genocide and crimes against humanity.

511. In light of the domestic legal framework and draft organic laws, the Commission has determined that a judicial mechanism structured along the Bosnian War Crimes Chamber model is the most feasible alternative of the options considered. The suggested modalities of this new system are as follows:

- That a new, specialized unit be created within the Office of the General Prosecutor to deal specifically with serious crimes as defined in the draft Penal Code of Timor-Leste;

- That the unit be structured under the executive authority of the General Prosecutor as currently provided for under UNTAET Regulations;

- That the unit recruit, in consultation with the United Nations and the Government of Timor-Leste, international prosecutors, investigators and requisite support staff to work together with local staff to assist in all aspects of investigations and prosecutions for a minimum period of two years, subject to further extension as required by the Government of Timor-Leste;

- That the international component be funded by the United Nations and other donors. In order to assist the Government of Timor-Leste in this regard, a donor fund should be established prior to creation of this unit;

- That the Government of Timor-Leste be encouraged to draft and implement a letter rogatory or mutual legal assistance arrangement with Indonesia to ensure that those at large outside the country be brought to Timor-Leste for prosecution. The agreement could cover, inter alia, the level of suspects Indonesia is willing to arrest and transfer to Timor-Leste for trial; and

- That the unit implement an incremental transition process as outlined in annex C to the report to ensure that the local staff will be sufficiently trained at the conclusion of the implementation period to be able to take over the serious crimes process. For instance, at the initial phases, this unit should be managed by an international prosecutor.

512. In relation to the judiciary, the Commission notes that the hiring of additional international judges is permitted under current UNTAET Regulations, without need for further amendments. The current constitutional and legislative framework requires that one Timorese judge is included in the Special Panels. This structure should be maintained, as it is compatible with the suggested implementation plan set out in annex C. Future legislative amendments would be required to ensure that the Special Panels are able to accommodate additional national judges at the conclusion of the implementation plan.

513. In relation to continuation of the work of Defence Lawyers Unit, the Commission also sees a clear need for international defence counsel to gradually transfer their case-load to co-counsel from Timor-Leste, while initially providing supervision and training, and later guidance and collegial advice.

B. Recommendations relevant to Indonesia

1. Reform of the judicial process and re-trial of persons indicted

514. The Commission recommends that Indonesia strengthen its judicial and prosecutorial capacity by assembling a team of international judicial and legal experts, preferably from the Asian region, to be appointed by the Government of Indonesia on the recommendation of the Secretary-General with a clear mandate to provide independent specialist legal advice on international criminal law, international humanitarian law and international human rights standards, including procedural and evidentiary standards.[124]

515. Since the trials undertaken by the Ad Hoc Human Rights Court were seriously flawed and not in conformity with national and international legal standards, the Commission recommends that the Attorney-General's Office comprehensively review prosecutions before the Ad Hoc Court and re-open prosecutions as may be appropriate, on the basis of additional charges, new facts or evidence or other grounds available under Indonesian law. The Commission recommends that the Office of the Attorney General review the KPP-HAM Report, with a view to issuing additional indictments as

[124] This would include legal research and drafting support for prosecutors in cases of serious violations of human rights, ensuring consistency in the legal theories advanced by the prosecution in indictments, selection of evidence and written submissions.

may be appropriate, considering the advice of the international legal advisory service recommended above.

516. If appropriate, the Commission recommends that de novo trials take place and that indicted persons be re-tried in accordance with acceptable national and international standards.

517. The Commission is also gravely concerned that high–level perpetrators such as those named in the *Wiranto et al.* indictment will not be brought to justice in Timor-Leste. The Commission makes the following recommendations in relation to the prosecution of high-level indictees who remain at large in Indonesia or elsewhere.

2. Prosecution of high-level suspects/indictees at large in Indonesia

518. The KPP HAM report has recommended that a number of individuals holding high-level Government posts be investigated. The Commission is unable to accept the reasons underlying the decision of the Attorney-General to decline proceeding against these individuals

519. The Commission takes the view that there is sufficient evidence accumulated by KPP HAM and the SCU for the investigation, indictment and prosecution of a number of these individuals, some of whom have been named in the *Wiranto et al.* indictment.[125]

520. The Commission has been advised that SCU case files and related materials are to be handed over to the Timorese authorities, in particular to the Office of the General Prosecutor. The Commission also notes that under the terms of reference of the Commission of Truth and Friendship, the Commissioners of that Commission are entitled to free access, in accordance with the law, to "all documents" of the Special Panels, which would probably include SCU materials.[126]

521. The Commission recommends that under the strict supervision, guidance and assistance of an appointed delegation of SCU staff members and/or other persons appointed by the United Nations, materials pertaining to the *Wiranto et al. indictment* be provided to the Attorney-General of Indonesia for investigation and prosecution.

522. This option must be discussed with the SCU/United Nations delegation to be based in Jakarta until the Attorney-General reaches a conclusion as to whether to prosecute or otherwise. The Commission emphasizes that this is an option that would require consultation with the SCU/United Nations delegation as there are witness protection issues, confidentiality and other security concerns that may arise.[127] The Commission suggests that the modalities of this option be resolved by the

[125] Much of the evidence has been documented in the public version of the "Brief in support of the application for the issuance of an arrest warrant for Wiranto", Special Panels for Serious Crimes, Case No. 5/2003, 19 March 2004.

[126] For instance, as outlined in Chapter II (C) of this Report, the Serious Crimes Unit had submitted to the Special panels binders of evidence (in redacted form) pertaining to the *Wiranto et al* indictment which are presently with the Special panels.

[127] In the "Motion to request a warrant application hearing pursuant to sections 27.2 and 19(A) of UNTAET Regulation 2000/30, as amended by Regulation 2001/25" filed on 27 Jan 2004 , the Deputy General Prosecutor for Serious Crimes applied for a public oral hearing to present evidence substantiating the charges against Wiranto, while maintaining necessary measures to ensure the safety of witnesses. The proposed procedure was also to provide General Wiranto an opportunity to be represented at the hearing. The Motion was rejected inter alia, on grounds that the Transitional Rules of Criminal Procedure did not provide for such a hearing.

parties concerned. It must also be reiterated that this recommendation is to be implemented in conjunction with the Commission's recommendation that the Attorney-General review the KPP-HAM Report for evidence relating to the individuals charged in the *Wiranto et al* Indictment.

523. It is further recommended that the Government of Indonesia provide a comprehensive report to the Secretary-General on the outcome of its investigations concerning these individuals, detailing the reasons for its decision to prosecute or otherwise, including prospects of a re-trial of any of the individuals previously tried before the Ad Hoc Court.

524. It is recommended that the Government of Indonesia implement these recommendations within six months from a date to be determined by the Secretary-General.

C. Establishment of an international criminal tribunal for Timor-Leste

525. If for any reason the above recommendations relevant to Timor-Leste[128] and Indonesia are not initiated by the respective Governments within the time frames set out above, or are not retained by the Security Council, the Commission recommends that the Security Council adopt a resolution under Chapter VII of the Charter of the United Nations to create an ad hoc international criminal tribunal for Timor-Leste, to be located in a third State.

D. Utilising the International Criminal Court

526. If the establishment of an international criminal tribunal is not feasible, the Security Council may consider the possibility of utilising the International Criminal Court as a vehicle for investigations and prosecutions of serious crimes committed in East Timor.

E. Exercise of universal jurisdiction

527. *Notwithstanding* the recommendations above, the Commission observes that Member States of the United Nations may, in accordance with their respective national laws, lend their jurisdiction to the international community *at any time* to pursue the investigation and prosecution of persons responsible for serious violations of human rights in East Timor in 1999.

F. Preservation of evidence

528. The Commission recommends that the United Nations provide adequate facilities and sufficient resources to ensure accurate and complete documentation and preservation of evidence generated by the serious crimes process in Dili.

[128] The Commission emphasises that the creation of the international criminal tribunal is not necessarily dependent on the implementation of the Commission's recommendations for Timor-Leste. The central objective of the incremental transition process is to strengthen institutional capacity. The investigation and prosecution of cases between Timor Leste and any international criminal tribunal may be resolved under provisions similar to Rule 11 *bis* of ICTY Rules of Procedure and Evidence.

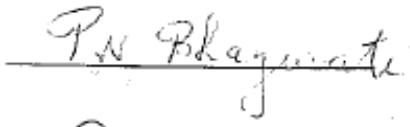
E. Conclusion

529. In the course of its work, the Commission has examined all relevant matters arising out of the events that took place in East Timor in 1999, when innocent children, women and men were mercilessly massacred. The Commission wishes to emphasize the extreme cruelty with which these acts were committed, and that the aftermath of these events still burdens the Timorese society. The situation calls not only for sympathy and reparations, but also for justice.

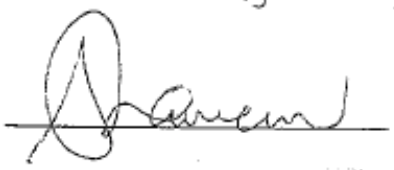
530. No violation of human rights, no invasion of human dignity and no infliction of pain and suffering on fellow human beings should be allowed to go unpunished. While recognizing the virtue of forgiveness and that it may be justified in individual cases, forgiveness without justice for the untold privation and suffering inflicted would be an act of weakness rather than of strength.

531. The international community is fully aware of the story of murders, rape, torture and enforced disappearances of East Timorese in 1999 and before. These are crimes that extend beyond the responsibility of the Governments of Timor Leste and Indonesia. These are crimes that concern humanity. The Report of the Commission of Experts may provide the last opportunity for the Security Council to ensure that accountability is secured for those responsible for grave human rights violations and human suffering on a massive scale and delivery of justice for the people of Timor-Leste.

Justice P. N. Bhagwati



Dr. Shaista Shameem



Professor Yozo Yokota

Geneva, 26 May 2005

Annexes A-C

Annex A - Selected Questionnaires

Annex B - Letter from the Catholic Church of East Timor

Annex C - Suggested Incremental transition process for new justice mechanism for Timor- Leste